Petition

Supreme Court, U.S.
FILED
JAN 8 1982
ALEXANDER L. STEVAS,
CLERK

81-1276

NO. ____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

FRANK C. McLISTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. FRANK McCABE
500 Sansome Street
Suite 212
San Francisco,
California 94111
Telephone:
(415) 397-1757

Attorney for Petitioner
FRANK C. McLISTER

QUESTIONS PRESENTED FOR REVIEW

1. Is the Court of Appeals ruling that, because petitioner had not suffered actual prejudice as a result of the conflict of interest between petitioner and his trial counsel, he was not deprived of the effectie assistance of counsel, at variance with this Court's opinions in Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457 (1942); Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173(1978); and Culyer v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708 (1980); which hold that once an actual conflict of interest between a defendant and his trial counsel is established, no showing of actual prejudice is required to warrant a reversal of a criminal conviction?

2. Where prosecutorial misconduct impinges upon the defendant's right to the effective assistance of counsel, is the test of whether the error was harmless to be determined under this Court's decision in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967), or under the test for nonconstitutional error set forth in Rule 52, Federal Rules of Criminal Procedure?

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PETITION FOR WRIT OF CERTIORARI
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The petitioner, FRANK C. McLISTER, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on September 8, 1981.

OPINION BELOW

The Court of Appeals entered its opinion on September 8, 1981. A copy is attached as Appendix "A." Petitioner's timely Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc was denied by Order of the Court on November 9, 1981. A copy of said Order appears herein as Appendix "B."

JURISDICTION

Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1). The Court of Appeal entered its opinion on September 8, 1981. Petitioner's Petition for Rehearing and Suggestion for an En Banc Hearing was denied on November 9, 1981.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in the determination of the instant case are set forth in Appendix "C."

STATEMENT OF THE CASE

On March 7, 1978, petitioner McLister, John Irwin, Sharon Baker and Thane Rucker were arrested in San Francisco, California. Subsequently, each was indicted in the United States District Court for the Northern District of California, in a two-count indictment. Count One charged the four defendants with conspiracy to distribute cocaine in violation of Title 21, United States Code, Section 846. Count Two charged the four defendants with distribution of cocaine in violation of Title 21, United States Code, Section 841(a)(1). The

defendants were tried jointly to a jury in July of 1978. The jury found Irwin and Baker guilty of both charges; acquitted Rucker on both charges; and acquitted petitioner on the conspiracy charge, but found him guilty of the distribution charge. Petitioner's conviction was reversed by the Court of Appeals for the Ninth Circuit. United States v. McLister, 608 F.2d 785 (9th Cir. 1979). The facts of the cases are generally set forth in that opinion.

The government retried petitioner in September of 1980. During the second trial, John Irwin appeared as a witness on behalf of the government. On redirect, Irwin testified that during the first trial of the case, petitioner's trial counsel had attempted, unsuccessfully, to persuade Irwin to testify in a

manner which would have been favorable to petitioner.

On appeal, petitioner urged that the trial court had committed reversible error in denying petitioner's motion for a mistrial based upon the conflict of interest which Irwin's testimony had engendered between petitioner and his trial counsel. The Court of Appeals, without citation to authority, disposed of petitioner's claims as follows: "Finding no prejudice to McLister, we conclude that the court correctly found there was no conflict warranting separate counsel."

Petitioner contends that the analysis utilized by the Court of Appeals is an incorrect application of the principles set forth by this Court to be used in conflict-of-interest cases.

REASONS FOR GRANTING THE WRIT

POINT ONE

The Court of Appeals' Ruling That Actual Prejudice Must Be Shown Before A Conviction Will Be Reversed On Grounds Of Conflict Of Interest Is At Odds With This Court's Rulings In Glass v. United States, Holloway v. Arkansas, and Culyer v. Sullivan

Almost forty years ago, this Court held that, "The right to counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. 60, 75-76, 62 S.Ct. 457 (1942).

Glasser involved a case in which the trial court insisted that one attorney represent two defendants in a conspiracy case, despite the representations by one of the defendants that he

desired the undivided assistance of counsel. This Court reversed Glasser's conviction on the grounds that a defendant who asserts his desire to counsel free from conflicting interests, is entitled to have his wishes accorded under the Sixth Amendment.

> Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness.
>
> * * *
>
> Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting or, indeed, even suggesting that counsel undertake to concurrently represent interests which might diverge from

> those of his first client, when the possibility of that divergence is brought home to the court.
> 315 U.S. at 75-76

Glasser established the principle that in conflict-of-interest cases, once a conflict is established, the court will not inquire into the amount of actual prejudice which a defendant suffered as a result of the conflict.

In Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173 (1978), this Court reiterated the principles established in Glasser. Holloway was a homicide prosecution in which one attorney had been appointed to represent the two men charged with the offense. Trial counsel informed the court that he believed a conflict of interest would develop if either or both defendants chose to testify, and moved the trial court to

appoint an attorney to represent the second defendant. The motion was denied. This Court reversed the convictions of both defendants, holding that no showing of actual prejudice is required.

> We read the Court's Opinion in Glasser, however, as holding that whenever a trial court improperly requires joint representation over timely objection, reversal is automatic.
>
> * * *
>
> But from the cases cited it is clear that the prejudice is presumed regardless of whether it was independently shown.
>
> * * *
>
> Moreover, this Court has concluded that the assistance of counsel is among those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."
> 98 S.Ct. at 1181

The principle was most recently reiterated by this Court in Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708 (1980). The Court stated that:

> [G]lasser established that unconstitutional multiple representation is never harmless error. Once the Court concluded that Glasser's lawyer had an actual conflict of interest, it refused 'to indulge in nice calculations as to the amount of prejudice' attributable to the conflict. The conflict itself demonstrated a denial of '(t)he right to have the effective assistance of counsel.' (Citation omitted.)

The Cuyler court put the test thusly:

> Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.
> 100 S.Ct. at 1719

The foregoing cases involved a conflict of interest predicated upon a single attorney's representation of multiple defendants. Yet is is clear that a conflict of interest may take other forms. The term "conflict of interest" bespeaks a situation in which regard for one duty tends to lead to disregard of another." United States v. Miller, 463 F.2d 600, 602 (1st Cir. 1972). Competition between the client's interests and counsel's own interests is recognized as one form of "conflict of interest" which may deprive a defendant of the Sixth Amendment right to the effective assistance of counsel.

> Competition between the client's interests and counsel's own interests plainly threaten that result, and we have no doubt that the conflict corrupts the relationship when counsel's duty to

> his client calls for a course of action which concern for himself suggests that he avoid. United States v. Hurt, 543 F.2d 162, 166 (D.C. Cir. 1976).

See also, A.B.A. Code of Professional Responsibility, EC 5-1 (1971). "Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client." Irwin's testimony created a conflict of interest between petitioner's concern in trial counsel's vigorous cross examination of the witness to establish that the witness was lying, and trial counsel's own interest in not being further implicated by Irwin. In this case trial counsel chose to protect his own interests and did not inquire further into the issue.

Irwin's testimony created a further conflict of interest in that it required

that trial counsel appear as a witness to rebut what Irwin had said. The incompatibility of the roles of an advocate and of a witness have long been recognized and are universally frowned upon. See Christiansen v. United States, 90 F.2d 152 (7th Cir. 1937). Because of the conflict of interest this creates, counsel has an ethical duty to avoid placing himself in that situation and to withdraw as counsel in favor of being a witness if the situation arises during trial. Code of Professional Responsibility, EC 5-10. In the instant case the trial court refused to permit trial counsel to withdraw so that he could appear as a witness on petitioner's behalf.

An actual conflict of interest

which affected the performance of trial counsel existed in this case. In Glasser itself, the court pointed to the inhibition on cross examination which occurs when an attorney is attempting to serve competing interests as evidence of an actual conflict of interest:

> ...a thorough cross-examination was indicated in Glasser's interest to fully develop Brantman's lack of reference to, or knowledge of, Glasser. Stewart's failure to undertake such a cross-examination luminates the cross-purposes under which he was laboring. 315 U.S. at 73.

The conflict between trial counsel's role as advocate and potential witness for petitioner, served to deprive petitioner of a witness who could have rebutted Irwin's testimony.

Thus, an actual conflict of interest existed between petitioner and his

trial counsel. Under Glasser, Holloway and Culyer, no further showing of actual prejudice need be shown to warrant reversal of petitioner's conviction. This Court should grant the writ to insure uniform application of the principles set forth in the foregoing cases.

POINT TWO

Where Prosecutorial Misconduct Impinges Upon The Right To The Effective Assistance Of Counsel, Is The Issue Of Whether The Error Was Harmless To Be Measured By The Standard For Constitutional Error (Chapman v. California) Or Nonconstitutional Error Under Rule 52, Federal Rules of Criminal Procedure ?

The Court of Appeals ruled that it was "improper" for the prosecutor to have suggested that petitioner's trial counsel had suborned Irwin's perjury in the first trial (Memorandum, p. 2:26-29). The Court refused to reverse petitioner's conviction on the ground that the comment was not sufficiently prejudicial to affect the verdict materially (Memorandum, pp. 2:32 - 3:1-3).

The test for determining whether the error was harmless, utilized by the Court of Appeals, was the standard set forth in Rule 52, Federal Rules of

Criminal Procedure: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." This test for assessing non-constitutional error has been interpreted by the Court of Appeals for the Ninth Circuit to mean that, in assessing the impact of nonconstitutional error, the judgment will be affirmed if the reviewing court finds that it is more probable than not that the error did not materially affect the verdict. United States v. Dixon, 562 F.2d 1138, 1143 (9th Cir. 1977), cert. denied, 435 U.S. 927 (1978). This is the test against which the Court of Appeals measured the effect of the prosecutor's misconduct in the instant case.

However, where the error is of constitutional dimension, the test

differs. Federal constitutional error can be held harmless only if the Court is able to declare a belief that the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824 (1967). Inherent in this Court's decision in Chapman is the recognition that prosecutorial misconduct may take various forms. Certain examples of the genus may result in nonconstitutional error, such as an argument to the jury which goes beyond the facts and legitimate inferences established by the evidence in a case. Other forms impinge upon a defendant's constitutional rights. Chapman itself was such a case.

In that case, the prosecutorial misconduct consisted of the prosecutor's

argument to the jury that the defendant's failure to testify justified an inference of his guilt. Because the misconduct impinged upon the defendant's Fifth Amendment privilege against self-incrimination, this Court held that before the error could be held harmless, the reviewing court must apply a more stringent standard than in cases involving nonconstitutional error.

Inherent in the Sixth Amendment right to counsel is the right to the effective assistance of counsel. Powell v. Alabama, 287 U.S. 45, 47, 53 S.Ct. 55 (1932). This Court has recognized that, implicit in the right to the effective assistance of counsel is, "the right to the services of an attorney devoted solely to the interests of the client." Von Moltke v. Gillies, 332 U.S. 708, 725,

68 S.Ct. 316 (1948). This premise was the constitutional underpinning of the decision in Glasser v. United States, supra, and its progeny in this Court--which are discussed in the foregoing portion of this Petition. The effect of the prosecutor's misconduct in the instant case was to create a conflict of interest between petitioner and his trial counsel where trial counsel, out of concern for his own interests, could not advocate fully and freely on petitioner's behalf. United States v. Hurt, supra, 543 F.2d at 166. The right to the effective assistance of counsel is certainly no less important than the privilege against self-incrimination, which was involved in this Court's decision in Chapman v. California, and the determination of whether its

infringement requires reversal should be measured by the same standard.

This Court should grant the Writ for the purpose of settling the important constitutional issue of what standard the reviewing court should apply in measuring the effect of prosecutorial misconduct which impinges upon a defendant's constitutional right to the effective assistance of counsel.

CONCLUSION

For the reasons set forth above, certiorari should be granted in this case.

DATED:

Respectfully submitted.

J. FRANK McCABE
500 Sansome Street
Suite 212
San Francisco, CA 94111
Telephone: (415) 387-1757

Attorney for Petitioner
FRANK C. McLISTER

(Appendices Follow)

APPENDICES

"A" - Memorandum of the Court of Appeals for the Ninth Circuit dated September 8, 1981

"B" - Order of the United States Court of Appeals for the Ninth Circuit denying Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc, dated November 9, 1981

"C" - Constitutional and Statutory Provisions Relied Upon in the instant Petition

APPENDIX "A"

FILED September 8, 1981
Richard H. Deane, Clerk, U.S. Court of Appeals

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	NO. 80-1655
vs.	D.C.NO. CR78-161-3
FRANK C. McLISTER, Defendant-Appellant.	MEMORANDUM

Appeal From The United States District Court For The Northern District of California, District Judge Robert H. Schnacke, Presiding

[Argued and Submitted August 11, 1981]

Before: SKELTON, Senior Judge, U.S. Court of Claims, WRIGHT and REINHARDT, Circuit Judges

McLister appeals his second jury conviction for distributing cocaine in violation of 21 U.S.C. § 841(a)(1). At

his first trial he was acquitted of conspiracy to distribute cocaine but convicted of distribution. The conviction was reversed on appeal and the government chose to retry him.

He alleges numerous trial errors and objects to the failure to give an instruction. Finding no error, we affirm.

I. Redirect Testimony and Examination

A key government witness, Irwin, was a co-defendant in McLister's first trial. He was convicted of conspiracy to distribute cocaine and of distributing cocaine.

In McLister's second trial, his attorney repeatedly and directly attacked Irwin's credibility on cross-examination. He succeeded in establishing that Irwin had perjured himself in the first trial.

On redirect examination, the prosecutor elicited testimony that McLister's counsel had suborned perjury.[1/]

McLister alleges numerous errors associated with this testimony.

A. Inadmissible Hearsay

We need not consider McLister's argument that Irwin's testimony was inadmissible hearsay. His vague, imprecise objection failed to preserve this issue for appeal. See United States v. Rubier, 651 F.2d 628, 630 (9th Cir. 1981); United States v.

Arteaga-Limones, 529 F.2d 1183, 1199 (5th Cir.), cert. denied, 429 U.S. 920 (1976); United States v. Dixon, 446 F.2d 224, 274 (9th Cir. 1971).

We conclude nonetheless that it was not hearsay. Irwin stated he was approached about telling a false story on the stand. No out-of-court statement was admitted to prove the truth of the matter asserted.

B. Prosecutorial Misconduct

McLister argues it was reversible error for the prosecutor to suggest that defense counsel suborned perjury. While we agree that this was improper, see United States v. Jones, 578 F.2d 1332, 1338 (10th Cir.), cert. denied, 439 U.S. 913 (1978); United States v. Agueci, 310 F.2d 817, 837 (2nd Cir. 1962), cert. denied, 372 U.S. 959 (1963), we hold that the comment was not sufficiently prejudicial to affect the verdict materially and require reversal. See United States v. Dixon, 562 F.2d 1138, 1143 (9th Cir. 1977), cert. denied, 435 U.S. 927 (1978).

C. Request to Withdraw

McLister says that his attorney was the only person who could rebut Irwin's redirect testimony and that the trial court erred by refusing (1) to declare a mistrial and allow him to withdraw and (2) to grant a continuance to allow for an investigation of the testimony.

Because we find that McLister was not unduly prejudiced by Irwin's testimony, we conclude that the court did not abuse its discretion in denying these requests. See United States v. Hernandez, 608 F.2d 741, 746 (9th Cir. 1979); Travelers Insurance Co. v. Dykes, 395 F.2d 747, 748-49 (5th Cir. 1968).

D. Effective Assistance of Counsel

McLister says that the denial of the request to allow his attorney to withdraw deprived him of effective assistance of counsel. He argues that Irwin's testimony impaired his attorney's credibility and that there was a conflict between his interests and his attorney's interest in not being further implicated in criminal activity.

Finding no prejudice to McLister, we conclude that the court correctly found there was no conflict warranting separate counsel. He was not deprived of effective assistance of counsel.

E. Scope of Redirect Examination

McLister alleges also that the government's redirect examination exceeded the scope of cross-examination.

The district court correctly held that it did not. McLister's counsel opened the door by establishing that Irwin perjured himself in the first trial. Because the redirect examination elicited evidence on that same subject, the court did not abuse its discretion

in allowing it. See United States v. Taylor, 599 F.2d 832, 839 (8th Cir. 1979); United States v. Lopez, 575 F.2d 681, 686 (9th Cir. 1978).

II. Co-Conspirator Exception to the Hearsay Rule

McLister argues the court erred in admitting tape recordings of Sharon Baker's conversation with a government agent because his acquittal of the conspiracy charge renders the co-conspirator exception to the hearsay rule inapplicable. Baker was another co-defendant in the first trial and was convicted of conspiracy to distribute cocaine and of distributing it.

Federal Rule of Evidence 801(d)(2)(E) provides that a statement is not hearsay if it "is offered against a party and is ... a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." The government must present a prima facie case, through the introduction of substantial independent evidence, that there was a conspiracy and that the defendant and the declarant were participants in it. United States v. Perez, No. 80-1320, slip op. at 3148 (9th Cir., June 29, 1981).

The evidence presented need not demonstrate the existence of a conspiracy beyond a reasonable doubt. Id. Admissibility is a question for the judge, not the jury. Id.

McLister does not deny that the government presented a prima facie case of a conspiracy in which he and Baker

were participants. His reliance on his acquittal is misplaced. It does not affect admissibility because the standard used to determine guilt, proof beyond a reasonable doubt, is different than the "prima facie case" standard used to determine admissibility. See United States v. Randall, 491 F.2d 1317, 1320 (9th Cir. 1974).

United States v. Ratcliffe, 550 F.2d 431, 433 (9th Cir. 1976) (per curiam), is not to the contrary. There the defendant was acquitted by the court at the close of the government's case. Where the evidence is not sufficient to take the conspiracy charge to the jury, it is not sufficient to meet the requirements of Rule 801(d)(2)(E). See United States v. Nixon, 418 U.S. 683, 701 n.14 (1974). Here, the evidence of conspiracy was sufficient to meet the requirements of the rule.

Other circuits hold that acquittal of the declarant of conspiracy does not render Rule 801(d)(2)(E) inapplicable. United States v. Gil, 604 F.2d 546, 549-50 (7th Cir. 1979); United States v. Davis, 578 F.2d 277, 281 (10th Cir. 1978);[2/] United States v. Cravero, 545 F.2d 406, 419 (5th Cir. 1976), cert. denied, 429 U.S. 1100 and 430 U.S. 983 (1977).

Baker's out-of-court statements were properly admitted.

III. Adequacy of the Jury Instructions

McLister says that the court erred when it refused to give his

requested instruction stating that he acted without the requisite intent.

There was no error. The instructions given, viewed in their entirety, encompass this theory. United States v. Hurd, 642 F.2d 1179, 1181-82 (9th Cir. 1981).

AFFIRMED.

FOOTNOTES

1/

"Q: Now have you been accused before of bringing the pounds of cocaine to San Francisco and taking it to Larkspur and leaving it at Frank McLister's house and trying to set up a deal?

MR. MAZER: I object to this line of questioning your Honor.

Q: (By Mr. Dawson) Have you been accused of doing that before?

A: Yes, I have.

Q: Did that occur at the first trial?

A: Yes, it did, sir.

Q: Now, had you been approached by anybody about that possibly telling that story on the stand prior to your taking the stand in that first trial?

A: Yes, I did.

Q: Who approached you about that?

A: Mr. Mazer [McLister's attorney].

Q: And when did that happen?

A: During the course of the previous trial."

2/

In Davis, the Tenth Circuit held that admissibility does not depend on whether the defendant or declarant is convicted of conspiracy. 578 F.2d at 281. The court stated in dictum, however, that it might be reversible error to decline to instruct the jury that, if it finds the declarant not guilty of conspiracy, it should not consider his out-of-court statements against the other defendants. Id.

This dictum is not the law in the Ninth Circuit. Because admissibility is a question for the judge, not the jury, and because the standard is less than "beyond a reasonable doubt," instructions such as those described in Davis are unduly generous to the defendant. See United States v. Miranda-Uriarte, 649 F.2d 1345, 1353 (9th Cir. 1981); United States v. Knight, 416 F.2d 1181, 1186 (9th Cir. 1969).

FILED September 8, 1981
Richard H. Deane, Clerk, U.S. Court
of Appeals

UNITED STATES OF AMERICA VS.
FRANK C. McLISTER - No. 80-1655

REINHARDT, Circuit Judge, Concurring:

I concur in the result. Under the particular circumstances of this case, the prosecutor's eliciting of a brief response charging the defendant's attorney with suborning perjury was not sufficiently prejudicial to require reversal, although I believe that ordinarily such conduct does have the requisite prejudicial effect. I seriously doubt whether the "co-conspirator's" statement was admissible in view of McLister's acquittal at a prior trial on the charge of conspiracy. However, after a careful review of the record, I believe that the error, if any, was not of constitutional dimensions, and was more probably than not harmless. United States v. Castillo, 615 F.2d 878, 882-84 (9th Cir. 1980).

APPENDIX "B"

FILED November 9, 1981
Richard H. Deane, Clerk
U.S. Court of Appeals

UNITED STATES OF AMERICA,	]	
	]	
Appellee,	]	NO. 80-1655
	]	
vs.	]	
	]	ORDER
FRANK C. McLISTER,	]	
	]	
Appellant.	]	
	]	

Before: SKELTON, Senior Judge, United States Court of Claims, WRIGHT and REINHARDT, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Wright and Reinhardt have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX "C"

CONSTITUTIONAL AND STATUTORY PROVISIONS RELIED UPON

Amendment Six:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defence.

United States Constitution

Rule 52, Federal Rules of Criminal Procedure:

Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Title 18, U.S.C., Rule 52

Title 21, United States Code,
Section 841(a)(1):

§ 841. Prohibited acts A

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

Title 21, United States Code,
Section 846:

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Title 28, United States Code,
Section 1254:

& 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Opposition

Office - Supreme Court, U.S.
FILED
FEB 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1276

In the Supreme Court of the United States

OCTOBER TERM, 1981

FRANK C. MCLISTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

SARA CRISCITELLI
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether a government witness's testimony about a conversation that he had with petitioner's attorney at the time of a previous trial created a conflict between the interests of petitioner and those of his attorney that deprived petitioner of the effective assistance of counsel.

2. Whether petitioner's conviction should have been reversed on grounds of prosecutorial misconduct.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1276

FRANK C. MCLISTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The affirmance by the court of appeals (Pet. App. A-1 to A-9) is reported in the table at 661 F. 2d 943.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1981. A petition for rehearing was denied on November 9, 1981 (Pet. App. A-10). The petition for a writ of certiorari was filed as of December 8, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of distribution of cocaine, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 18 months' imprisonment,

to be followed by a special parole term of three years. The court of appeals affirmed (Pet. App. A-1 to A-9).[1]

1. The evidence at trial established that in December 1977, John Irwin had been arrested by a Denver narcotics detective on a cocaine charge. At that time he agreed to become a confidential informant in order to avoid prosecution (Tr. 147-148, 310-311). However, despite this agreement, Irwin continued to engage in his own drug transactions on the side, a practice commonly known as "double dealing" (Tr. 151).

In February 1978, John Wisdom, a Denver police detective assigned to the Drug Enforcement Administration, was introduced to Irwin, who was described as a person who could supply large quantities of drugs (Tr. 61, 110). Wisdom knew that Irwin had been giving information to police but believed Irwin was double dealing (Tr. 109, 111). In March 1978, Irwin told Wisdom that a source in San Francisco had cocaine available to sell by the pound (Tr. 63). Accordingly, Wisdom travelled to San Francisco that month and arranged to meet with the source outside a San Francisco hotel (Tr. 69-80). There Wisdom, Irwin, and co-defendant Sharon Baker, Irwin's girlfriend, met petitioner and another man in a camper truck. Petitioner, the driver of the camper, produced a leather briefcase containing approximately 363 grams of 87% pure cocaine (Tr. 84-90, 253). After testing the cocaine, Wisdom gave a pre-arranged signal to surveilling DEA agents and arrested Irwin and petitioner (Tr. 91-93).

In his defense, petitioner denied that he was the source of the seized narcotics. He testified that Irwin and Baker,

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[1]Petitioner earlier had been tried with co-defendants John Irwin, Sharon Baker and Thane Rucker and had been convicted on the distribution count but acquitted on a charge of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846. That conviction was reversed by the court of appeals. 608 F. 2d 785 (1979).

friends of his from Denver, visited him in San Francisco. After eating dinner in a restaurant, they all returned to petitioner's home where they were joined by two other couples. According to petitioner, Irwin brought the briefcase that contained the cocaine to his home and told petitioner that he was acting with the Denver police to set up a big cocaine deal (Tr. 256-264). After much hesitation, petitioner testified, he agreed to do Irwin a favor by storing the briefcase with the cocaine in the back of his camper truck and by driving into San Francisco the next day to deliver the briefcase to Irwin (Tr. 265, 270).

2. On cross-examination, petitioner's counsel extensively highlighted the discrepancies between Irwin's testimony at his trial the previous year (see note 1, *supra*) and his testimony in the retrial of petitioner. In particular, the cross-examination focused on Irwin's testimony at the first trial that he engaged in the cocaine transaction solely to have Wisdom arrested, in accordance with his informant arrangement (Tr. 180-181, 217), and that he did not know who first produced the cocaine at petitioner's house (Tr. 206-207).

On redirect examination, the prosecutor asked Irwin if he had "been accused before of bringing the pound of cocaine to San Francisco and taking it to [petitioner's house] and leaving it [there] and trying to set up a deal?" (Tr. 222). Irwin acknowledged that he had been so accused, at the first trial (*ibid.*). The prosecutor then asked Irwin whether he had "been approached by anybody about * * * telling that story on the stand prior to your taking the stand in that first trial?" (*ibid.*). Irwin responded that Mr. Mazer, petitioner's attorney at both the first and instant trials, had approached him in this regard. Petitioner's counsel then moved for a mistrial, but the district court denied the motion on the ground that counsel's cross-examination of Irwin had opened up the line of questioning pertaining to the first trial.

After a brief recess, petitioner's attorney moved for dismissal of the indictment on the ground of misconduct by the prosecutor in not informing petitioner prior to trial that the prosecution intended to put defense counsel's credibility in issue (Tr. 227). The district court denied the motion, concluding that defense counsel's cross-examination of Irwin had created the impression that Irwin and his attorney had presented a phony defense at the first trial and that defense counsel had in any event opened up the matter of the first trial (Tr. 230). Petitioner's attorney also renewed his motion for a mistrial on the ground that the prosecutor's question had created a conflict between petitioner's interests and the attorney's desire to defend himself against any suggestion of impropriety. The court again refused to grant a mistrial, stating (Tr. 232):

> I think you are belaboring this problem. I don't think this problem is there. I don't think the jury paid any attention to it. And you are building it into headlines, but it isn't there.

Petitioner did not request that the court give a cautionary instruction that the jury disregard the exchange.

The court of appeals affirmed. The court concluded that there was no conflict of interest between petitioner and his attorney that warranted separate counsel and that Irwin's testimony on redirect examination had not prejudiced petitioner (Pet. App. A-3, A-4).

ARGUMENT

1. Irwin stated on redirect examination that petitioner's counsel asked him at the first trial whether he would testify that he (Irwin) had brought the cocaine to petitioner's home. Petitioner contends (Pet. 6-15) that this statement created an actual conflict of interest requiring reversal of his conviction. The court of appeals correctly rejected this claim.

The Sixth Amendment right to counsel includes the right to be represented by an attorney whose loyalties are undivided. *Wood* v. *Georgia*, 450 U.S. 261, 271 (1981); *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980); *Holloway* v. *Arkansas*, 435 U.S. 475, 481 (1978). "[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. * * * But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Cuyler* v. *Sullivan, supra*, 446 U.S. at 349-350.

In this case, petitioner has failed to make the threshold showing of a conflict between his own interests at trial and those of his attorney.[2] The story that defense counsel allegedly discussed with Irwin was essentially the version to which petitioner himself testified at trial. There is, moreover, nothing inherently suspicious about defense counsel's investigation into the possibility of corroboration by other witnesses of his client's testimony. Nor did Irwin's statement pit counsel's interests against those of his client. Assuming that counsel was motivated as a result of Irwin's

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[2]Here, unlike in *Cuyler* v. *Sullivan, supra*, the attorney did raise an objection to his continued representation of petitioner. But the circumstances that counsel claimed gave rise to the asserted conflict in this case occurred in the presence of the court and therefore did not involve any confidential information such that reliance on the representations of counsel might have been required. Compare *Holloway* v. *Arkansas, supra*, 435 U.S. at 485. After hearing argument from counsel, and informed by its own assessment of the impact of the exchange between the prosecutor and Irwin, the court denied the motion. This is not a case like *Holloway*, then, where the trial court failed to take adequate steps to ascertain whether the asserted risk of a conflict required other counsel. See *id.* at 484.

testimony to clear his own reputation, that end would have been best served by discrediting the government's witnesses and gaining an acquittal for his client.[3]

Petitioner also has failed to demonstrate how the asserted conflict adversely affected his lawyer's performance. The testimony by Irwin of which petitioner complains occurred on redirect examination, so it in no way interfered with counsel's ability to conduct cross-examination. And although counsel did not subsequently question Irwin specifically regarding the prosecutor's questions, he did conduct a recross-examination that was in part directed at Irwin's motives for perjuring himself at his first trial (see Tr. 224-225, 236-237). Counsel did not, of course, testify as a defense witness to impeach Irwin's credibility by denying what petitioner contends was an allegation of subornation of perjury.[4] However, such testimony would have been inadmissible in any event, as it "would amount to no more than purported impeachment with regard to collateral matters having nothing to do with the issues of the case." *United States* v. *Cochran*, 499 F. 2d 380, 391 (5th Cir. 1974), cert. denied, 419 U.S. 1124 (1975); see also *United States* v. *Nace*, 561 F. 2d 763, 771 (9th Cir. 1977). Petitioner does

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[3]This situation is thus unlike those cases in which an attorney, in an attempt to protect his own interests, provides representation in a manner that is contrary to the interests of his client. See, *e.g.*, *People* v. *Corona*, 80 Cal. App. 3d 684, 720-721, 145 Cal. Rptv. 894, 915-916 (Ct. App. 1978) (counsel's book contract invested him with a financial stake in a prolonged, publicized, and sensational trial, in contravention of the defendant's interest in a trial on partially or completely stipulated facts and proceeding on an incompetency defense).

[4]Disciplinary Rules 5-101(B)(4) and 5-102(A) of the ABA Code of Professional Responsibility (1978) provide that a lawyer may continue his representation in a case after appearing as a witness if his withdrawal would work "substantial hardship" to his client because of the distinctive value of the lawyer's services. Petitioner's attorney did not seek to invoke this exception to the attorney-witness rule, and the courts below therefore did not consider its applicability here.

not suggest that counsel labored under a conflict in putting on a defense case generally, nor does the record demonstrate any conflict in that regard. Finally, petitioner fails to point to any area in which another lawyer would have pursued a different strategy. Cf. *Willis* v. *United States*, 614 F. 2d 1200, 1205-1206 (9th Cir. 1979); *United States* v. *Medel*, 592 F. 2d 1305, 1312 (5th Cir. 1979). In short, petitioner's contention that a conflict existed and adversely affected his attorney's performance "draws too heavily upon speculation to support a [finding of ineffectiveness]." *United States* v. *Canessa*, 644 F. 2d 61, 63-64 (1st Cir. 1981).

2. Petitioner next contends (Pet. 16-21) that the prosecutor's questioning of Irwin about events occurring at the time of the first trial was prosecutorial misconduct that requires reversal of his conviction. The district court (Tr. 225-226, 232) and the court of appeals (Pet. App. A-3 to A-4) both concluded that this brief exchange between the prosecutor and Irwin was not significantly prejudicial to petitioner. This fact-bound issue does not warrant further review by this Court.

After Irwin acknowledged that he had been accused at the earlier trial of bringing the cocaine to California, leaving it at petitioner's home, and trying to set up a deal, the prosecutor asked Irwin: "Now, had you been approached by anybody about that possibly [*sic*] telling that story on the stand prior to your taking the stand in that first trial?" (Tr. 222). Irwin replied that he had been approached in this regard by petitioner's attorney during the first trial (Tr. 222-223). This is the entire exchange of which petitioner complains. It comprises a total of eight lines in a trial transcript of more than 400 pages.

Petitioner argues (Pet. 16) that in asking the question, the prosecutor was implying that his attorney had suborned perjury. But the prosecutor did not ask Irwin whether

defense counsel had asked him to *lie* on the stand; he only asked whether defense counsel had approached Irwin about testifying in a particular manner. It is not improper for defense counsel to inquire whether a witness is able to corroborate a version of events that will help his client. If the witness's version of events is not consistent with that of his client, counsel of course cannot ask the witness to lie. But the exchange to which petitioner objects does not expressly contain such an accusation. Moreover, as the district court observed (Tr. 230), even if this exchange is read to contain such an accusation by implication, defense counsel's cross-examination of Irwin itself had implied that Irwin and his attorney had fabricated a defense; this may have opened the door for the prosecutor's questioning of Irwin on redirect examination (see Tr. 228).

Petitioner further argues that the asserted prosecutorial misconduct was of constitutional dimension because it created a conflict between petitioner and his attorney, thereby requiring reversal unless it can be shown to have been harmless beyond a reasonable doubt. See Pet. 16-21, citing *Chapman* v. *California*, 386 U.S. 18, 24 (1967). Thus, he argues (Pet. 17), it was error for the court of appeals to apply (Pet. App. A-3) its standard of review for prosecutorial misconduct of a non-constitutional dimension, under which a conviction will be affirmed if the reviewing court finds that "it is more *probable* than not that the error did not materially affect the verdict." *United States* v. *Dixon*, 562 F. 2d 1138, 1143 (9th Cir. 1977), cert. denied, 435 U.S. 927 (1978) (emphasis in original). This argument fails for two reasons.

First, in his brief in the court of appeals, petitioner himself urged that "[t]he standard for reversal due to prosecutorial misconduct is that reversal is required unless it is more probable than not that the misconduct did not materially affect the verdict (*United States* v. *Dixon*, 562 F. 2d

1138 [9th Cir. 1977])" (Br. 33).[5] Petitioner therefore may not complain that the court of appeals agreed with him and applied the standard he argued was appropriate.[6]

Second, the question put by the prosecutor here, assuming again that it constituted misconduct, was not error of constitutional dimension. As explained above (see pages 5-6, *supra*), the question did not create an actual conflict of interest for defense counsel, since it would have been in the interest of both petitioner and his attorney to dispel any impression that counsel had suborned perjury and that the version of events about which Irwin had been asked to testify was false.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

SARA CRISCITELLI
Attorney

FEBRUARY 1982

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[5]Petitioner, however, did urge the *Chapman* harmless constitutional error standard in his petition for rehearing in the court of appeals, at pages 9-13.

[6]We note, moreover, that the *Chapman* standard has not been thought to apply to derogatory comments or accusations directed at defense counsel. See, *e.g.*, *United States* v. *Martino*, 648 F. 2d 367, 388 n.10 (5th Cir. 1981); *United States* v. *Preston*, 634 F. 2d 1285, 1293-1294 (10th Cir. 1980); *United States* v. *Taxe*, 540 F. 2d 961, 968 (9th Cir. 1976), cert. denied, 429 U.S. 1040 (1977); *Carter* v. *United States*, 437 F. 2d 692, 693, 694 (D.C. Cir. 1970), cert. denied, 402 U.S. 912 (1971); *Cline* v. *United States*, 395 F. 2d 138, 141 (8th Cir. 1968); *United States* v. *Agueci*, 310 F. 2d 817, 836-837 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963).

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